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Attorneys for Moving Parties BLUE ROCK CAPITAL, LTD., ESPRO INVESTMENTS, LTD., MEGACOR INVESTMENTS (PTY) LTD., KIRAN SALES (PTY) LTD, and QUICK DRINKS COMPANY (PTY) LTD.

UNITED STATED DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED MEDICAL DEVICES, LLC, a California limited liability company, UNITED CONVENIENCE SUPPLY LLC, a Delaware Limited Liability Company,

Plaintiffs,

v.

BLUE ROCK CAPITAL, LTD., a Mauritius Limited Liability Company; ESPRO INVESTMENTS, LTD., a Mauritius Limited Liability Company; PRASANTH SEEVNARYAN, an individual; and DOES 1-50,

Defendants.

MEGACOR INVESTMENTS (PTY) LTD, a South African limited liability company; KIRAN SALES (PTY) LTD, a South African limited liability company; and QUICK DRINKS COMPANY (PTY) LTD, a limited liability company registered in the Republic of South Africa;

Plaintiffs,

v.

UNITED MEDICAL DEVICES, LLC, a California limited liability company, UNITED CONVENIENCE SUPPLY, LLC, a Delaware Limited Liability Company, JIMMY ESEBAG, an individual, and NICHOLAI ALLEN, an individual,

Defendants.

RELATED CASES:

Civil Action 2:16-cv-01255-PSG-SSx
and
Civil Action 2:16-cv-03176-PSG SSx

NOTICE OF MOTION AND MOTION TO CONSOLIDATE THE RELATED ACTIONS PENDING BEFORE THE HON. PHILIP S. GUTIERREZ; MEMORANDUM OF POINTS AND AUTHORITIES; AND DECLARATION OF ANTHONY B. GORDON

Date: August 1, 2016
Time: 1:30 p.m.
Ctrm: 880
Roybal Federal Building

Judge: Hon. Philip S. Gutierrez

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 1, 2016, 2016, at 1:30 p.m., in Courtroom 880, Edward R. Roybal Federal Building, 255 East Temple Street, Los Angeles, CA 90012-3332, moving parties BLUE ROCK CAPITAL, LTD., ESPRO INVESTMENTS, LTD., MEGACOR INVESTMENTS (PTY) LTD., KIRAN SALES (PTY LTD., and QUICK DRINKS COMPANY (PTY) LTD., all foreign corporations, will move this Court for an order consolidating the two related actions currently pending before this Honorable Court., i.e., Civil Action No. 2:16-cv-01255-PSG-SSx, and Civil Action No. 2:16-cv-03176 PSG-SSx.

The motion will be made on the grounds that the two actions involve common questions of law and fact, and that it would be in the interests of justice and judicially more economical for the court and all the parties to consolidate these cases pursuant to Federal Rule 42(a) of the Federal Rules of Civil Procedure.

This motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the accompanying declaration of Anthony Gordon, and such other and further oral or documentary evidence as may be presented at the hearing.

This motion is made following the conference of counsel which took place pursuant to Local Rule 7-3 on May 19, 2016.

GORDON & GORDON
A Professional Law Corporation

Dated: May 26, 2016

By: /s/ **Anthony B. Gordon**

ANTHONY B. GORDON
Attorneys for Moving Parties
BLUE ROCK CAPITAL, LTD., ESPRO INVESTMENTS, LTD., MEGACOR INVESTMENTS (PTY) LTD, KIRAN SALES (PTY) LTD. and QUICK DRINKS COMPANY (PTY) LTD.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Where two related actions are before the same judge, involve the same parties, the same facts, the same witnesses, the same documents, the same legal issues, and where each action will require the same discovery, the Court should exercise its discretion and consolidate the two actions under Federal Rule 42(a) of the Federal Rules of Civil Procedure.

II. PROCEDURAL HISTORY

Civil Action 2:16-cv-01255-PSG-SSx – THE BLUE ROCK ACTION

On September 16, 2015, plaintiffs UNITED MEDICAL DEVICES, LLC ("UMD" and UNITED CONVENIENCE SUPPLY LLC ("UCS") filed this action against defendants BLUE ROCK CAPITAL, LTD., ("BLUE ROCK"), ESPRO INVESTMENTS, LTD., ("ESPRO") and Prasanth Seevnarayan ("Seevnarayan"), in the Superior Court of California, Los Angeles County, Santa Monica Division (the "BLUE ROCK ACTION"). BLUE ROCK and ESPRO are Mauritius limited liability corporations, and Seevnarayan is a resident and citizen of South Africa.

On February 24, 2016, BLUE ROCK and ESPRO removed the BLUE ROCK ACTION to this Honorable Court based on diversity of citizenship. On February 29, 2016, defendants BLUE ROCK and ESPRO filed a motion for an order dismissing the complaint under Rule 12(b)(6), and defendant Seevnarayan filed a motion to quash service of the complaint on him in his personal capacity. On March 25, 2016, UMD and UCS filed a motion to remand the BLUE ROCK ACTION back to the Superior Court in Santa Monica. The three motions are scheduled for hearing on June 6, 2016, before the Hon. Judge Philip S. Gutierrez.

In the BLUE ROCK ACTION, UMD and UCS allege two separate claims for breach of a written Distributorship Agreement under which BLUE ROCK and ESPRO had acquired the exclusive rights from Plaintiffs UMD and UCS to distribute Playboy licensed products in Africa and India. (See Complaint in BLUE ROCK ACTION, at ¶ 15.)

Civil Action 2:16-cv-03176-PSG SSx – THE MEGACOR ACTION

On May 9, 2016, plaintiffs MEGACOR INVESTMENTS (PTY) LTD., (“MEGACOR”) KIRAN SALES (PTY) LTD., (“KIRAN”) and QUICK DRINKS COMPANY (PTY) LTD., (“QUICK DRINKS”) filed an action in this Honorable Court against UMD and USC, and their principals JIMMY ESEBAG and NICOLAI ALLEN, seeking damages in excess of $15,000,000, based on claims for breach of contract, failure to disclose/ concealment, intentional misrepresentation and negligent misrepresentation (the “MEGACOR ACTION”). This case was allocated Civil Action No. 2:16-cv-03176-RSWL-AFMx. Pursuant to this Court’s Order dated May 16, 2016, Civil Action No. 2:16-cv-03176-RSWL-AFMx is now Civil Action No. 2:16-cv-03176-PSG(SSx) since both cases are related and are now before the same judge.

As demonstrated below, this action involves the same parties, the same legal issues and is based on the same underlying facts in the BLUE ROCK ACTION, namely, the contracts relating to the distribution of Playboy licensed products in Africa and India.

III. APPLICABLE LAW

Rule 43(a)(2) of the Federal Rules of Civil Procedure provides: “If actions before the court involve a common question of law or fact, the court may consolidate the actions.” In *Investors Research Company v. U.S. District Court for the Central District of California*, 877 F.2d 777 (9th Cir. 1989), the Ninth Circuit repeated the approach that “[t]he district court has broad discretion under the rule to consolidate cases pending in the same district.” Id. at p. 777.

“In determining whether to consolidate, ‘a court weighs the interest in judicial convenience against the potential for delay, confusion, and prejudice caused by consolidation.’ *Paxonet Communications, Inc. v TransSwitch Corp*, 303 F.Supp. 2d 1027, 1028-29 (N.D.Cal.2003).

Solannex, Inc. v. Miasole, Inc. 2013 WL 430984, (N.D. Cal. 2013), involved two patent infringement cases involving the same parties, the same accused products, and similar patents from the same family describing similar technology. The Court held: "Proof of infringement at trial would involve bringing many of the same witnesses, including the prosecutor and named inventor of all four patents. Courts have held that in the patent context, cases with the same basic technology, the same parties, and the same alleged infringing actions may be consolidated in the interests of judicial economy. Allowing such cases to proceed in parallel would involve duplicative proceedings and filings and would be unduly burdensome on both the parties and the court." Id. at p. *2.

In *Dusky v. Bellasair Investments*, 2007 WL 4403985 (U.S. District Court, C.D. 2007) the court articulated the criteria for consolidation as follows:

> "The purpose of consolidation is to enhance court efficiency and to avoid substantial danger of inconsistent adjudications. *E.E.O.C. v. HBE Corp*., 135 F.3d. 543, 551 (8th Cir. 1998). The party moving for consolidation bears the burden of proving that consolidation is desirable. [Citation omitted.] ¶ The threshold issue is whether the two proceedings involve a common party and common issues of fact or law. [Citation omitted.] . . . ¶ To determine whether to consolidate, a court weighs the interest of judicial convenience against the potential for delay, confusion and prejudice caused by consolidation. [Citation omitted.] In addressing whether or not to consolidate, a court should consider: (1) the risk of delaying trial. [Citation omitted.]; (2) the risk of prejudice and confusion. [Citation omitted.]; and (3) the potential burden on the parties, witnesses and available judicial resources. [Citation omitted.]" *Dusky v. Bellasair Investments*, 2007 WL 4403985, pp. *1, 2.

It is clearly in the interests of judicial efficiency that these cases be consolidated to avoid unnecessary duplication of evidence, procedures and costs. Remanding this case back to the Superior Court in Santa Monica will operate against judicial efficiency by requiring the same parties to try the same facts in two different forums, one in the federal court, and the other in the California Superior Court. This will involve the unnecessary duplication of motion practice, discovery practice, and different procedures and time limits in the federal court and in the state court. The net effect will promote judicial inefficiency. Further, it would create a danger of two inconsistent judgments involving the same parties, facts and legal issues. Hence, consolidation should be ordered.

As demonstrated below, the facts in issue satisfy all the necessary benchmarks for consolidation.

IV. BOTH PROCEEDINGS INVOLVE COMMON PARTIES AND COMMON ISSUES OF FACT AND LAW

(a) Common Parties

UMD and UCS are plaintiffs in this action and defendants in the MEGACOR ACTION. As such they are common parties in both actions.

(b) Common Issues of Fact

Both actions involve the distribution of the same Playboy licensed products (condoms, lubricants and electronic cigarettes and cigars) by UMD and UCS to MEGACOR, KIRAN, QUICKDRINKS, BLUE ROCK and ESPRO for distribution in South Africa, other parts of Africa and India. The schedule below identifies the same factual issues alleged in the complaints in both actions, and demonstrates the commonality of the factual issues.

BLUE ROCK ACTION (Case No. 2:16-cv-01255 PSG-SSx)	**MEGACOR DRINKS ACTION** (Case No. 2:16-cv-03176 PSG-SSx)
UMD and USC acquired from Playboy Enterprises International, Inc. an exclusive, worldwide license to manufacture, market and sell condoms, lubricants and electronic cigarettes, cigars and other vapor products under the Playboy trademark. Complaint, ¶¶ 13 and 14.	UMD and USC hold the licensing rights to manufacture, distribute and sell products bearing the "Playboy" and "Rabbit Head Design" mark. Complaint, ¶ 9.
On about April 1, 2014, Plaintiffs and Defendants signed a distribution agreement for the distribution and sale of Playboy Condoms and Playboy Lubricants from	Towards the end of 2011, Prasanth Seevnarayan entered into negotiations with ESEBAG and ALLEN representing UMD and UCS, with a view to members of the

UMD and Playboy vapor products from UCS in Africa, India, Bangladesh, Nepal, and Sri Lanka. Complaint, ¶ 15.	group of companies referred to as the "South African Group" acquiring Playboy licensed condoms for resale, and the rights to distribute the same in South Africa and India. In about March 2013, further negotiations continued between ALLEN and Seevnarayan in Thailand, pursuant to which ALLEN offered Seevnarayan the opportunity to distribute electronic smoking devices in Africa and India. Following discussions between ESEBAG and ALLEN and Seevnarayan, members of the South African Playboy Distribution Group purchased Playboy licensed products, including condoms, lubricants and electronic cigarettes and cigars from UMD and UCS. Complaint, ¶ ¶ 10, 13 and 16.
Defendants BLUE ROCK, ESPRO and Seevnarayan breached the Distribution Agreement by failing to do the following: (a) have minimum net sales of $500,000 of Playboy Condoms in India per year; (b) purchase a minimum of $1,000,000 of Playboy electronic smoking products from UCS for India per year; (c) purchase a minimum of $1,200,000 of Playboy electronic smoking products from UCS for Africa per year; (d) purchase a minimum of 2 containers	Defendants UMD and USC's breached separate distribution agreements with MEGACOR, KIRAN and QUICK DRINKS in the following way: (a) failing to make available for delivery to Plaintiff in a timely manner the Playboy products purchased pursuant to the invoices attached to the complaint as Exhibits 1 through 14. (b) failing to deliver the electronic smoking devices that were of merchantable quality and free from defect; (c) failing to offer replacement spare parts for the electronic smoking devices; (d) failing to include holograms with the Playboy condoms;

of Playboy Lubricants for Africa per year. Complaint, ¶ ¶ 16 and 17.	(e) failing to cooperate with Plaintiffs in their attempts to obtain the Playboy products ordered but not delivered; (f) delivering less product than the amount ordered; (g) delivering products that were past or almost past the expiry date; and (h) overcharging Plaintiff for numerous items. Complaint, ¶ 36.

BLUE ROCK and ESPRO have not yet answered the complaint in the BLUE ROCK ACTION, but they will file cross-claims that are based on the same facts supporting the claims alleged by MEGACOR, KIRAN and QUICK DRINKS in the MEGACOR ACTION.

(c) There was a Continuous Ongoing Relationship Between the Parties Over a Period of Time that Overlapped Both Actions

The strongest argument in favor of consolidation is the continuing relationship between UMD and UCS, as the holders of the licensing rights to Playboy products on the one hand, and MEGACOR, KIRAN, QUICK DRINKS, BLUE ROCK and ESPRO on the other. UMD and UCS allege in paragraph 15 of their complaint in the BLUE ROCK ACTION:

> "On or about April 1, 2014, Plaintiffs on the one hand and Defendants on the other signed a written ten year distribution agreement for the distribution and sale of Playboy Condoms and Playboy Lubricants from US and Playboy Vapors from UCS in many countries in the continent of Africa and India, Bangladesh, Nepal, and Sri Lanka ("India") ("Distribution Agreements"), in return for royalty payments and other fees."

Despite what is alleged above, there has been an ongoing business relationship between all the parties involving the distribution of Playboy products both before and after April 1, 2014. On June 13, 2013, some eight months before April 1, 2014, ALLEN sent an e-mail to Prasanth Seevnarayan at "ps@playboycondoms" stating:

> "Dear Prasanth,
>
> Please see attached the most beautiful lubricant line you have ever seen. It is premium quality coming from top notch labs in the Netherlands EU…. We are going to take this to market. The cost per bottle for the water based is $2.50 and for Silicone based (less volume, premium segment) is $4.00, reatiling for over $20.00 in the USA."

A copy of this e-mail is attached to the Gordon Declaration as Exhibit "1."

This ongoing business relationship continued well past March 29, 2014, when ESEBAG sent an e-mail to Prasanth Seevnarayan captioned "*Moving Forward,*" in which he writes:

> "You will have a brand new license starting on Monday for a 12 month period, including all your minimum in India 1.5M as well as Minimum for South Africa 500K reduced as discussed to 1M for both products and territories."

A copy of this e-mail is attached to the Gordon Declaration as Exhibit "2."

By August 28, 2015, the parties were still doing business with each other as demonstrated by an e-mail from Sona Singh to Nicolai Allen in which she complains:

> "Just to bring to your attention, we were very concerned with the egos coming back from customers at the kiosks . . . My huge concern is that we have stock coming from China with the same issues, we will experience the same problems."

A copy of this e-mail is attached to the Gordon Declaration as Exhibit "3."

These e-mails demonstrate an ongoing business relationship between all the parties arising out of their relationship involving the distribution of Playboy licensed products in Africa and India. Therefore, these cases should be tried before the same court.

(d) Common Issues of Law

The subject matter of both actions involve the distribution of Playboy licensed products which MEGACOR, KIRAN, QUICK DRINKS, BLUE ROCK and ESPRO had acquired from UMD and UCS, for distribution in South Africa, other parts of Africa and

India. Both sides allege the other side breached the various agreements in issue, and the common denominator in each action involves the distribution of condoms, lubricants and electronic smoking devices in South Africa, Africa and India.

(e) Witnesses

Both actions involve the same witnesses. Apart from ESEBAG and ALLEN, most, if not all of the witnesses for MEGACOR, KIRAN, QUICK DRINKS, BLUE ROCK and ESPRO will testify about the circumstances surrounding the negotiations, the business relationships between the parties over several years, the transactions in issue, and the breaches by UMD and UCS. There are numerous witnesses in this case, and they are based in different countries, such as South Africa, India, China, Mauritius and Thailand. (See Gordon Declaration, ¶ 5.) It will be a logistical nightmare, apart from the huge costs involved, for these witnesses to travel from half way across the world in a different hemisphere and time zone to Los Angeles, California, to testify in two separate actions.

(f) Consolidation Will Not Cause Any Delays, Prejudice or Confusion

As the parties are not yet at issue, and no discovery has been undertaken, it is hard to conceive of how consolidation could possibly result in any delays, prejudice or confusion. If anything, consolidation will eliminate any potential for delays, prejudice and confusion.

(g) The Effect of an Appeal in One Action on the Other Action

An appeal in the case that gets to trial first, will certainly result in delays in the second trial. If the same facts and legal issues are tried in two separate forums, issues may arise involving collateral estoppel and res judicata, which consolidation of the actions would avoid.

(h) Judicial Economy and Convenience

In a case of this nature where the same parties are involved in both actions, and where witnesses reside in South Africa, Mauritius, India and other parts of Africa, it will be in the interests of the courts and the parties for issues to be resolved in one judicial forum rather than two. This will substantially reduce the costs of litigation as the parties would be litigating and conducting discovery in a single court rather than in two separate courts. From the court's perspective, it would be an enormous waste of judicial resources for virtually the same cases to wend their way through both the federal court and the state court systems.

Further, conducting discovery on the same issues in both the federal court and the state court will involve a duplication of the same discovery. Moreover, there will be the prospect of inconsistent rulings in two separate courts on the same factual and legal issues.

V. CONCLUSION

For the foregoing reasons, the Court is respectfully requested to consolidate the BLUE ROCK ACTION and the MEGACOR ACTION for trial.

GORDON & GORDON
A Professional Law Corporation

Dated: May 26, 2016

By: /s/ **Anthony B. Gordon**

ANTHONY B. GORDON
Attorneys for Moving Parties
BLUE ROCK CAPITAL, LTD., ESPRO INVESTMENTS, LTD., MEGACOR INVESTMENTS (PTY) LTD, KIRAN SALES (PTY) LTD. and QUICK DRINKS COMPANY (PTY) LTD.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 5550 Topanga Canyon Boulevard, Suite 200, Woodland Hills, California 91367-6478.

On May 26, 2016, I served the foregoing documents described as:

NOTICE OF MOTION AND MOTION TO CONSOLIDATE THE RELATED ACTIONS PENDING BEFORE THE HON. PHILIP S. GUTIERREZ; MEMORANDUM OF POINTS AND AUTHORITIES; AND DECLARATION OF ANTHONY B. GORDON

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Michael J. Perry, Esq. 4640 Admiralty Way, Suite 500 Marina del Rey, California 90292 Peter W. Ross Brown George Ross LLP 2121 Avenue of the Stars, Suite 2400 Los Angeles, CA 90067 UNITED MEDICAL DEVICES, LLC 1901 Avenue of the Stars, Suite 470 Los Angeles, CA 90067	Jimmy Esebag 1901 Avenue of the Stars, Suite 470 Los Angeles, CA 90067 Nicolai Allen 1901 Avenue of the Stars, Suite 470 Los Angeles, CA 90067 UNITED CONVENIENCE SUPPLY LLC 1901 Avenue of the Stars, Suite 470 Los Angeles, CA 90067

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Woodland Hills, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on May 26, 2016, at Woodland Hills, California

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Linda Gordon